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No. 143

IN THE

Supreme Court of the United States

October Term—1952

JOHN JAROSZEWSKI,

Petitioner,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY WITH BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner John Jaroszewski respectfully prays for a writ of certiorari to the Supreme Court of New Jersey, to review a judgment of that Court entered on the 7th day of April, 1952, reversing a judgment of the Hudson County Court, Law Division, of the State of New Jersey, rendered on the verdict of the jury for plaintiff in an action under the Federal Employers Liability Act, 35 Stat. 65, c. 149 as amended, 45 U. S. C. A. Sections 51 *et seq.*

Summary and Short Statement of Matters Involved

Petitioner, an employee of the Central Railroad Company of New Jersey, respondent herein, was injured by the falling of a freight car door while he was performing his duties as such employee. He brought his action for damages under the Federal Employers Liability Act charging the respondent railroad with negligence. At the end of the trial, the case was submitted to the jury, which returned a verdict of $15,000 in favor of petitioner. On respondent's motion for a new trial, the Trial Court reduced the verdict to $7,000. On appeal by the respondent to the Appellate Division of the Superior Court of New Jersey, the case was certified by the Supreme Court of New Jersey on its own motion, and the judgment reversed by a majority of the Court, one Justice dissenting, which held that petitioner failed to prove negligence on the part of the respondent and that the motion to dismiss should have been granted. Thereupon it was ordered that judgment be entered for the respondent.

It is the petitioner's contention that by reversing the judgment rendered by the jury, the Supreme Court of New Jersey in effect denied petitioner his right to trial by jury guaranteed by the Constitution. The petitioner further contends that when the Supreme Court of New Jersey reversed the verdict of the jury, in effect it applied the defense of assumption of risk, which is specifically excluded as a defense under the Federal Employers Liability Act. The Court, in the guise of finding non-negligence on the part of the respondent, applied the qualified defense of contributory negligence to defeat petitioner's rights under the Federal Employers Liability Act notwithstanding the contrary provisions of that statute. In deciding as a matter of law that no inference of railroad negligence could be drawn from the facts adduced at the trial, the Court invaded the jury's historic function,

disregarded the nature and scope of the rights and obligations arising under the Federal Employers Liability Act and failed to recognize that assumption of risk must be vigorously excluded, and that contributory negligence does not defeat the action, but merely bears on damages. This holding contravenes the authorities cited herein.

It is the petitioner's contention that in reaching this result, the Supreme Court of New Jersey disregarded the principles of law laid down by this Court in *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184; *Western & A. R. Co.* v. *Hughes*, 278 U. S. 496; *New York C. R. Co.* v. *Marcone*, 281 U. S. 345; *Lumbra* v. *United States*, 290 U. S. 551; *Jenkins* v. *Kurn*, 313 U. S. 256; *Seago* v. *N. Y. C. R. Co.*, 315 U. S. 781; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600; *Lavender* v. *Kurn*, 327 U. S. 645; *Jesionowski* v. *Boston & Maine R. R.*, 329 U. S. 452; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Johnson* v. *United States*, 333 U. S. 46; *Wilkerson* v. *McCarthy*, 336 U. S. 53.

In the cases above cited this Court has held that questions such as here decided by the Supreme Court of New Jersey, as matters of law, are for the jury; that the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that conflicts in the evidence, the credibility of witnesses and the weight to be given to their testimony are for the jury; that on the issue of liability, if reasonable and fairminded men may honestly draw different conclusions from the evidence, the question is one for the jury; that the refusal to submit such issues to the jury constitutes an abdication of any trial court's sworn duty to guard and protect the right of litigants suing under the

Federal Employers Liability Act to jury trial, and that to deprive railroad workers of the benefits of this right takes from them a goodly portion of the relief afforded by Congress.

This Court has also held in the cases above cited that courts are not free to set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable; that Congress by abolishing the defense of assumption of risk did not intend to leave open the identical defense by changing its name to non-negligence and that such a result will not be permitted.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C. A., Section 1257, subdivision (3).

(b) The Statutes of the United States applied by the Supreme Court of New Jersey are 45 U. S. C. A., Sections 51 *et seq.*; 35 Stat. 65, c. 149, as amended.

(c) The judgment of the Supreme Court of New Jersey was rendered on April 7, 1952. This petition for writ of certiorari was filed within the time provided for by the rules.

Question Presented

Is the application by the Supreme Court of New Jersey of the United States Statutes, commonly known as the Federal Employers Liability Act, inconsistent and in conflict with controlling decisions of the Supreme Court of

the United States where (a) its decision usurped the function of the jury; (b) it applied assumption of risk and contributory negligence in the guise of non-negligence to defeat a jury verdict and (c) it totally disregarded the controlling federal decisions?

Reasons for Granting the Writ

The Supreme Court of New Jersey has decided a Federal question of importance and substance in a manner not in accord with the decisions of this Court. It reversed a judgment of the trial court in an action brought under the Federal Employers Liability Act, where the jury had found the respondent guilty of negligence. By its decision the Supreme Court of New Jersey has failed to preserve for litigants in Federal Employers Liability cases their right to a trial by jury; it misinterpreted the scope and effect of the 1939 amendment to the Federal Employers Liability Act, doing away with the defense of assumption of risk; it has created a conflict between the application of the federal act in the state and federal courts.

It is essential that a writ be granted in order to preserve for litigants in Federal Employers Liability Act cases, their right to trial by jury, and in order to determine important questions relating to construction, interpretation and application of the Federal Statute in New Jersey, especially with respect to the interpretation by the New Jersey court of the scope and effect of the 1939 amendment doing away with the defense of assumption of risk, and in order to settle the conflict created by the decision of the Supreme Court of New Jersey.

Wherefore your petitioner prays that a writ of certiorari be issued out of, and under the seal of this Court directed to the Supreme Court of New Jersey, com-

manding said Court to certify and send to this Court a transcript of the record in the case entitled John Jaroszewski, Plaintiff-Respondent v. The Central Railroad Company of New Jersey, Defendant-Appellant, Docket No. A-92, September Term, 1951, including the proceedings in said Supreme Court, to the end that said cause may be reviewed by this Court and the judgment of the Supreme Court of New Jersey be reversed.

Dated: June 16, 1952.

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IN THE

Supreme Court of the United States

October Term—1951

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vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The trial court submitted the case to the jury which returned a verdict for plaintiff (17).* The Supreme Court of New Jersey reversed the trial court. Its opinion, which is printed in the Appendix, is officially reported in 9 N. J. 231.

Jurisdiction

The judgment of the Supreme Court of New Jersey was rendered April 7, 1952.

The jurisdiction of the Supreme Court is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C. A., Section 1257, subdivision (3).

* Numerical references relate to the pages of the record.

Statutes Involved

The Federal Employers Liability Act (Apr. 22, 1908) 35 Stat. 65, c. 149 as amended, 45 U. S. C. A., Sec. 51 *et seq.*

Sec. 51, Title 45 U. S. C. A. provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Sec. 53, Title 45 U. S. C. A. provides as follows:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 54, Title 45 U. S. C. A. provides as follows:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Statement of the Case

Petitioner, a railroad car inspector about fifty-six years of age, was injured by the falling of a freight car door while he was performing his duties as an employee of de-

fendant The Central Railroad Company of New Jersey, hereinafter referred to as "Central," in its railroad yard "E" in Jersey City, New Jersey. He brought this action for damages, specifically invoking the Federal Employers Liability Act (16) in the Hudson County Court, Law Division, of the State of New Jersey. Defendant was charged with negligence in failing to make reasonable inspection, in failing to make repairs, in failing to remove the car from service and in failing to warn petitioner of the defective condition of the door as a result of which the freight car door fell upon him and caused the injuries (11).

The defenses were that petitioner was guilty of contributory negligence (3, 16); that the accident was caused by the sole negligence of petitioner, and that petitioner assumed the risk (16).

The car in question (159) although not owned by the defendant railroad, came under its control on July 23, 1948, at Taylor, Pennsylvania, where it was examined by one Regan, a car inspector for Central (133-134). The car at the time was loaded, and the door was closed. When Regan inspected the car, he found that it was in fair condition to move, and took no exception to the car (159). From Taylor, Pennsylvania the train moved to Elizabethport, New Jersey, arriving on July 24, 1948. Here it was inspected by Hurley and Ivanson, two other car inspectors for the Central. The car—one of 57 in the train—at this time was still loaded and the door closed and sealed (133-135, 160-161). No attempt was made to open the door. The inspectors found all items in good order and noted no exceptions (160-161). The following day the car was moved to Perth Amboy, New Jersey, and unloaded at that point by the consignee (133-135). The next movement of the cars was from Perth Amboy to the Jersey City yards of Central, at which place it arrived on July 27, 1948, empty and with its side door open (133-135).

Two days later the petitioner, who had worked as a car repair helper, car oiler and was at the time a car inspector (129), while examining a train of cars had occasion to inspect the freight car in question. He had examined about five or six cars when he noticed that the side door of this freight car was open (89). He had been instructed that in conjunction with his duties of inspecting the cars for defects, if he found a door open he was to close the door, and if the door would not close he was to determine what was wrong and shop it (90, 130, 152). It was the policy of the Central not to allow a car to ride in a high-speed train on a main line with the door open (152).

Petitioner first looked inside the car, which measured about forty feet long and which was over thirteen feet high, and noticed that the floor was in order and that the car was empty (90). He looked at the bottom rail, the door, door handle and door hasp (91). The car was brand new (91). He put his hands on the handle of the door which measured six feet high and seven feet wide, and attempted to close the door (91-92). The door moved to a point six or seven inches away from the door post and stopped (92). When it stopped, petitioner immediately looked at the bottom rail along which the door ran, to see what had caused the door to stop (93). The bottom rail was clear (93). He started to raise his head to look on top and before he could do so the door, weighing from two to three hundred pounds, fell on him (93).

It was shown that the car in question was on a track three feet away from an adjoining track, and that in order to protect himself petitioner would have to stand close to the car in examining the car, from which point the top rail was not in view (91).

After this occurrence and the removal of the door, an examination by Shippey, who was the foreman, and by

one Conway, the attention of both of whom was directed to the fact that there was some defect (144, 156) disclosed beyond question that a portion of the top rail over the doorway was defective (136, 156-158). It had been bent up so that while it would hold the door in its open position, it would not hold the door if it were moved to its closed position (156).

At the close of the entire case, defendant moved for a dismissal of the action on the ground that petitioner had failed to establish negligence on the part of defendant (163). The motion was denied, the trial judge holding that whether or not the defendant was guilty of negligence was a jury question (173). The case was then submitted to the jury which returned a verdict of $15,000 in favor of petitioner, and judgment was entered thereon on September 14, 1951. On defendant's motion for a new trial (22) the trial court reduced the verdict to $7,000.

The appeal by defendant to the Appellate Division of the Superior Court was certified on its own motion by the Supreme Court of New Jersey which reversed the judgment and directed final judgment in favor of the defendant.

Specification of Errors to be Urged

The Supreme Court of New Jersey committed prejudicial and reversible error:

1. In reversing the trial court and holding as a matter of law that there was no evidence of negligence to support the submission of the case to the jury, thereby usurping the function of the jury.

2. In holding under the guise of non-negligence on the part of respondent, that petitioner assumed the risk of his employment and was guilty of contributory negligence so as to defeat the jury verdict.

ARGUMENT

I.

The Supreme Court of New Jersey usurped the function of the jury and erred in determining as a matter of law that no inference of negligence on the part of the respondent could be drawn from the facts adduced at the trial.

The Supreme Court of New Jersey in reversing the verdict of the jury and directing that judgment be entered for the respondent, stated (p. 4a-appendix):

> "* * * There is nothing in the record to prove or from which legitimate inferences can be drawn that the defendant should have inspected the car at Perth Amboy, or that it was unreasonable for it to run the car from that point to its Jersey City yard before returning it to service."

It is submitted that this holding completely disregarded the conflicting evidence that was before the jury. The testimony clearly indicated that the respondent railroad inspected the car on July 23, 1948, at Taylor, Pennsylvania; that it inspected it on July 24, 1948, at Elizabethport, New Jersey, but that it made no inspection thereafter. The car arrived in Jersey City on the 27th of July. It was two days later—on July 29—that the petitioner while performing his duties for the respondent suffered the injury complained of when the door fell on him, which occasioned the suit (89, 133-135, 159-161).

One of the reasons advanced by the Supreme Court of New Jersey for its holding that the respondent was not negligent was that there was no proof that (p. 4a-appendix)—

> "* * * the siding of the consignee was a convenient or proper place to make an inspection, nor is there

proof of the necessity of or a practice, a custom, in railroading to make inspection of cars after their being unloaded by a consignee."

However, the fact of the falling of the door on the petitioner under the circumstances which in the ordinary course of human experience, would not have occurred but for the negligence of the respondent is an evidential inference for the jury to consider. The respondent was bound to show that it had exercised reasonable care to avoid the occurrence. It was under a duty to make reasonable inspection at convenient places of cars hauled over its road during the journey for the purpose of discovering defects likely to occur in the course of transportation. *Anderson* v. *Erie R. R, Co.*, 68 N. J. L. 647 (E. & A., 1903). There was proof that from July 24th until July 29th, when the accident occurred, no inspection had been made. Could not the jury have inferred from the facts that the failure to inspect for a period of five days was not the conduct of a reasonably prudent person under the circumstances? This question was one of fact for the jury. However, the Supreme Court of New Jersey by its decision took the issue of negligence away from the jury and decided as a matter of law that there was no negligence on the part of the respondent, basing its decision on failure of proof on the part of petitioner when in fact the failure of proof was on the part of the respondent, since there was a duty on it to make reasonable inspections.

The opinions of this Court, in construing the Federal Employers Liability Act, have repeatedly declared that it is "the clear Congressional intent that, to the maximum extent proper, questions in actions arising under the Act should be left to the jury," *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 68; that such cases may not be taken from the jury merely because the question of liability is

"close or doubtful," *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354; that the jury has the right to make "all reasonably possible inferences" from such probative facts in the evidence as it chooses to accept, and "it is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences," *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29; that in any choice between possible inference "a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference," but "only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear," *Lavender* v. *Kurn*, 327 U. S. 645.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, this Court said:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The falling of the door under the circumstances disclosed by the record gave rise to an inference of negligence on the part of the respondent under the doctrine of *res ipsa loquitur*.

In *Pitcairn* v. *Perry*, 122 F. 2d 881 (C. C. A. 8th, 1941); certiorari denied 314 U. S. 697, the facts were identical with those of the instant case. The court there held that the question of negligence was for the jury to determine. Also see:

Sweeney v. *Erving*, 228 U. S. 233;
Jesionowski v. *Boston & Maine R. R.*, 329 U. S. 452;

Johnson v. *United States*, 333 U. S. 46;
Long v. *Union Pac. Rd. Co.*, 192 F. 2d 788 (U. S. C. A. 10th, 1951).

The fact that the petitioner made specific allegations of negligence did not deprive him of the benefit of the doctrine of *res ipsa loquitur*. Indeed, the doctrine may be invoked to establish the particular acts causing the accident alleged just as any proof which petitioner might seek to introduce would be limited to the establishment of the negligence alleged.

Zumwalt v. *Gardner*, 160 F. 2d 298 (C. C. A. 8th, 1947).

II.

In holding under the guise of non-negligence on the part of respondent that petitioner assumed the risk of his employment and was guilty of contributory negligence so as to defeat the jury verdict, the Supreme Court of New Jersey committed reversible error.

The Supreme Court of New Jersey, in deciding as a matter of law that no inferences of railroad negligence could be drawn from the facts adduced at the trial, itself drew from the evidence a reverse inference that the sole proximate cause of the petitioner's injury was his own negligence in not observing the bent top rail, stating (p. 2a-appendix):

> "* * * A subsequent examination of the car disclosed a damaged top door rail which was obviously defective and which condition could have been discovered by the plaintiff had he looked at it prior to attempting to close the door."

This indicates and illustrates a determination on the part of the Court to draw from the evidence all inferences

necessary for the support of its opinion, including what it deemed to be petitioner's failure to take proper precautions. In other words, the Court was in effect denying a recovery by reason of supposed contributory negligence of petitioner. However, contributory negligence does not preclude recovery under the Federal Employers Liability Act. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29; *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Carter* v. *Atlantic & St. A. B. R. Co.*, 338 U. S. 430.

If, therefore, under the Federal Employers Liability Act petitioner's negligence contributing with respondent's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, the statute would be nullified by calling petitioner's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. His act was the same act by whatever name it is called. Furthermore, the Supreme Court of New Jersey failed to show an awareness of the nature and scope of the rights and obligations arising under the Federal Employers Liability Act as laid down by the Supreme Court of the United States decisions. It failed to recognize that assumption of risk must be rigorously excluded. The Supreme Court of New Jersey based its decision, among other reasons, on the following (pp. 4a-5a-appendix):

> "* * * It was his (referring to the petitioner) very duty to discover the defect which he asserts the defendant should have discovered by adequate previous inspection.* * *
>
> • • •
>
> "* * * It cannot be said that in such circumstances there was a violation of duty and disregard when it was the very performance of that duty which caused plaintiff's injuries."

The Supreme Court of New Jersey thereby completely disregarded the effect of the 1939 amendment, 53 Stat. 1404, 45 U. S. C. A. Sec. 54 to the Federal Employers Liability Act.

In *Pitcairn* v. *Perry*, 122 F. 2d 881 (C. C. A. 8th, 1941), certiorari denied 314 U. S. 697, plaintiff, a car inspector, sued the railroad under the Federal Employers Liability Act for injuries received from the falling of a freight car door while he was performing the duties of his employment. On appeal from a verdict of the jury in favor of the plaintiff, the Circuit Court of Appeals held that because of the fact that the door was under the employer's control and because of the employer's superior or exclusive knowledge thereof, there was a basis for the adoption of the "res ipsa loquitur" rule. It further held that the plaintiff as a railroad car inspector did not assume extraordinary risks arising from his employment.

It is submitted that the holding in that case is dispositive of the argument of the Court below that because of the fact that the petitioner was a car inspector and was injured during "the very performance of that duty" the respondent was not guilty of negligence.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 58, this Court in discussing the 1939 amendment said:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2) 1893, 45 U. S. C. A. Sec. 1, 'Unless great care be taken, the servant's rights will be sacrificed

> by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

Clearly the New Jersey holding is reversible error in view of the specific provisions of the Federal Employers Liability Act excluding the defense of assumption of risk and providing that contributory negligence does not bar recovery but merely bears on damages.

CONCLUSION

It is respectfully submitted that the opinion of the Supreme Court of New Jersey in this case is in conflict with the express provisions of the Federal Employers Liability Act and controlling decisions of this Court construing that Act; that a writ of certiorari should be granted in order that this Court review the record and opinion of the Supreme Court of New Jersey and finally reverse the same.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Opinion of Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

No. A-92, SEPTEMBER TERM, 1951

JOHN JAROSZEWSKI,

Plaintiff-Respondent,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Defendant-Appellant.

Argued March 10, 1952; decided April 7, 1952.

On appeal from the Hudson County Court, Law Division.

Mr. Anthony T. Augelli argued the cause for the appellant; Mr. William F. Hanlon, attorney; Messrs. Milton, McNulty & Augelli, of counsel.

Mr. Alfred Brenner argued the cause for the respondent; Mr. Herbert L. Zeik, attorney.

The opinion of the court was delivered by

OLIPHANT, J. This is an appeal from a judgment of the Hudson County Court entered as the result of a jury verdict for the plaintiff of $15,000, which was reduced, on motion directed to the trial court for a new trial, to $7,000. The appeal, taken to the Appellate Division of the Su-

perior Court, was certified by this court on its own motion. A cross-appeal by the plaintiff was abandoned at the argument.

The plaintiff, a car inspector in the employ of the defendant, was injured while inspecting a freight car in defendant's Jersey City yard. He thereupon brought an action against the defendant under the provisions of the Federal Employers' Liability Act, 45 *U. S. C. A.*, § 51 *et seq.*, based on the railroad's alleged negligence.

At the time of the accident, July 29, 1948, plaintiff had been a railroader for over 17 years and was an experienced car inspector. While engaged in inspecting a train of cars he had occasion to inspect the freight car involved in the instant suit. He noticed that the side door of the car was open and the car empty; he attempted to close the door but it jammed within six or seven inches of the door post; he looked at the bottom door rail and found it in good order but before he examined the top door rail the door fell on him causing the injuries which occasioned the suit. A subsequent examination of the car disclosed a damaged top door rail which was obviously defective and which condition could have been discovered by the plaintiff had he looked at it prior to attempting to close the door.

The car in question was not owned by the defendant railroad but came under its control on July 23, 1948, at Taylor, Pa. At that point inspection by the defendant disclosed it was in good condition. At the time the car was loaded the top door rail was in good order and no exceptions were taken to the car by the inspector. From Taylor, Pa., the train moved to Elizabethport, N. J., where it arrived July 24. The car was still loaded. Again it was inspected, the top rail being visible was found in good order and no exceptions to its condition noted. The door was locked and sealed. The car was then moved the follow-

ing day to Perth Amboy and was unloaded at that point by the consignee, the defendant railroad having nothing to do with the unloading. From the Perth Amboy siding of the consignee the car was moved to the Jersey City yards of the defendant where it arrived on July 27, empty, with its side door open. It was then that the plaintiff was sent two days later to inspect it, during which inspection he received the injuries complained of.

At the close of the case the defendant moved for a dismissal of the action on the ground that the plaintiff had failed to prove negligence on its part. The motion was denied. Such denial is the first ground relied upon as error and the only one we need concern ourselves with

[1] The Federal Employers' Liability Act is not a workman's compensation law and in order to be entitled to a verdict a suitor must prove that the defendant was negligent. *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649 91 L. Ed. 572, 67 S. Ct. 598 (1947); *Eckenrode* v. *P. R. Co.*, 335 U. S. 329, 93 L. Ed. 41, 69 S. Ct. 91 (1948); *Di Bernardo* v. *D. L. & W. R. Co.*, 130 N. J. L. 479 (E. & A., 1943).

The plaintiff's complaint did not specify the nature of defendant's negligence, but in answer to interrogatories he asserted that the negligence was in failing to make reasonable inspection, failure to make repairs, failure to remove the car from service and failure to warn the plaintiff of its defective condition. All these charges depend on the first, that of failure to make reasonable inspecton, and none of them were supported by the proofs.

A railroad's duty with respect to the inspection of cars is set forth in *Anderson* v. *Erie R. Co.*, 68 N. J. L. 547 (E. & A., 1903). In the case *sub judice* the defendant fully performed that duty. It inspected this car when it came on its lines at Taylor, Pa., it inspected it again at Elizabethport, and it was during the very process of inspecting it

at Jersey City following the discharge of its cargo at Perth Amboy that the plaintiff was injured. It was his very duty to discover the defect which he asserts the defendant should have discovered by adequate previous inspection. There is nothing in the record to prove or from which legitimate inferences can be drawn that the defendant should have inspected the car at Perth Amboy, or that it was unreasonable for it to run the car from that point to its Jersey City yard before returning it to service.

Neither *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943), nor *Cork* v. *Lehigh Valley R. R. Co.*, 98 N. J. L. 143 (E. & A., 1922), on which the plaintiff strongly relies, are factually in point or controlling. The former case was an action by a railroad policeman who was injured while inspecting car seals in a railroad yard by a train on the adjoining track, and the opinion dealt primarily with the doctrine of assumption of risk under the Federal Employers' Liability Act; in the latter case the employee was not engaged in car inspection at the time of his accident, and the rule set out in that case was that a railroad company is under a duty to make reasonable inspection of cars hauled over its road at convenient places during their journey for the purpose of discovering defects likely to occur in the course of transportation. In the instant case there is no proof whatever that the siding of the consignee was a convenient or proper place to make an inspection, nor is there proof of the necessity of or a practice, a custom, in railroading to make inspection of cars after their being unloaded by a consignee.

Plaintiff's own theory is that the damage to the door rail occurred in the act of unloading and that there was a failure to inspect after the unloading even though he was injured in doing that very thing at Jersey City. It

cannot be said that in such circumstances there was a failure of duty in this regard when it was the very performance of that duty which caused plaintiff's injuries.

[2] All the plaintiff succeeded in proving in this case was that he was injured when a defective door on a railroad car fell upon him, and he completely failed to prove any negligence on the part of the defendant. Under such circumstances the motion to dismiss should have been granted and judgment entered for the defendant.

[3] The judgment below will be reversed and under the rule, 1:4-9(b), final judgment will be entered here in favor of the defendant.

For reversal—Chief Justice VANDERBILT, and Justices HEHER, OLIPHANT and BURLING—4.

For affirmance—Justice WACHENFELD—1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 143.

JOHN JAROSZEWSKI,

Petitioner,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Court of New Jersey (Pb1a; also printed as an Appendix to Petitioner's Brief) is reported at 9 N. J. 231.

Jurisdiction.

The jurisdiction of this Court is correctly designated in the Petition.

Questions Presented.

I. Whether the evidence upon the trial of this action was sufficient to support a jury verdict for the Petitioner.

II. Whether any important question of Federal Law is here presented.

III. Whether the decision below is in conflict with any other decision of this or any lower Federal Court.

Statute Involved.

The Federal Employers Liability Act (April 22, 1908), 35 Stat. 65, c. 140, as amended (45 U. S. C. A. Sec. 51, et seq.).

Statement.

The Statement set forth in the Brief in Support of the Petition is substantially correct. Respondent desires to add that petitioner, himself, testified (R108a) that it was his duty to inspect railroad cars for his employer (the respondent), for the purpose of locating defects and ascertaining what was wrong; it being within his discretion to determine whether the existence of any defect required the removal of a car from service for repairs (R111a). Petitioner's experience as a car inspector and repairman had extended over a period of 17½ years, covering his employment with respondent and with other railroads (R106a).

The injury for which petitioner sought damages occurred at 6:00 p. m. on July 29, 1948, in daylight. The car was a "brand new" box car (R91a). Petitioner found it standing empty in respondent's yard, with its door open

(R90-91a). He had looked inside, and inspected the door, its handle and hasp, and the bottom rail upon which it moved. Without looking at the top rail of the door, petitioner undertook to close it, and succeeded in completing all but six or seven inches of complete closing when the door stopped, and would move no further. At that point, he looked again at the bottom rail, and while doing so, the door fell on him (R92-94a). The fall of the door was caused by the "bent up" condition of the upper guide rail on which it moved. The condition of this upper rail was obvious and apparent to anyone who might look at it (R137, 154, 156a). The upper door rail had been damaged by the steel cable of a crane used in unloading the cargo of heavy copper billets with which the car had been loaded (R137, 147, 148a). The unloading had been performed at Perth Amboy, between July 25 and 27, 1948, but not while in the possession of nor by the respondent or its employees (R134, 135, 153a). The car had been inspected, on the day before delivery to unloading point, by respondent's inspector (Hurley), and found in good order (R160a). The inspection, in which petitioner was engaged when he was injured, was the first which respondent had made after resumption of possession of the car following its unloading by other agencies (R133a). The car did not belong to respondent, but was the property of another railroad (The St. Louis & San Francisco) (R133, 145a). Petitioner had inspected railroad box cars and ordered them "shopped" (withdrawn from service for repairs) for defects in their door equipment, including bent upper and lower door rails, on November 24 and 30, 1946, January 9, April 16, 29 and 30, June 3 and 11, and July 7, 10 and 17, 1948 (R132a).

Petitioner returned to work 16 days after his accident; lost wages totalling $179.62, and incurred medical expense of approximately $24.00 (R118, 138a). He returned to

work August 15, 1948, and had worked continuously every scheduled working day, including some "doubles", except for four days, up to the date of trial (R139-141a).

ARGUMENT.

I.

The decision below is clearly correct.

The Statute (35 Stat. 65, c. 149, as amended) imposed upon respondent liability in damages to petitioner only for injury resulting from the negligence of any officer, agent or employee of respondent, or by reason of any defect or insufficiency, due to respondent's negligence, in its cars.

> 45 U. S. C. A. § 51;
> *Wilkerson* v. *McCarthy*, 336 U. S. 53.

Respondent was not an insurer of petitioner's safety. As was pointed out by Mr. Justice Frankfurter in his joinder in the dissenting opinion of Mr. Justice Roberts in *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350 (at p. 358) this Court should not strain the law of negligence to accord workmen's compensation, where the employer is without fault.

Petitioner had the burden of proving both negligence on the part of respondent and a causal relationship between such negligence, if any, and petitioner's injuries.

> *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67;
> *Brady* v. *Southern R. Co.*, 320 U. S. 476, 484;
> *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 29;

Ellis v. *Union Pacific R. Co.*, 329 U. S. 649, 653;
Eckenrode v. *Pennsylvania R. Co.*, 335 U. S. 329;
Barry v. *Reading Co.*, 147 Fed. 2d 129; cert. den. 324 U. S. 867.

If the sole cause of his injuries was petitioner's own carelessness, such fact would preclude a finding of causal negligence on the part of respondent, but would not constitute or be equivalent to a finding of contributory negligence. The sole ground upon which the respondent based its motion to the trial court to dismiss the complaint (made after all of the evidence had been presented) was the claimed insufficiency of the evidence to establish negligence on the part of the defendant (respondent here). No contention was urged either that the plaintiff (petitioner here) was contributorily negligent or that he assumed the risk (R163a).

The particular aspect of charged negligence upon which petitioner relied at the trial was failure to make reasonable inspection of the car (R11, 166a). The trial court apparently recognized (R169a) that the sole duty of inspection to locate defects rested upon the petitioner; but the trial court was also apparently under the impression that, because the car door did not fall until he had pushed it almost to a closed position, his inspectorial function was limited to the ascertainment of whether the car doors were closed and his duty to the closing of them. Such impression fails to find support in the evidence. The testimony, including that of petitioner, conclusively indicated that the closing of car doors which were open was but one of the steps which petitioner was required to take in discharging his duty as car inspector.

The (appellate) court below decided that there was no reasonable basis in the evidence upon which a jury could

find against respondent (Pb5a). The reviewing court therefore held that the preliminary question of law—*i.e.*, whether there was any competent evidence to go to the jury upon the liability issue—should have been decided in respondent's favor, and, accordingly reversed and entered judgment for respondent.

Petitioner's contention here that the New Jersey Supreme Court, in reversing the judgment of the trial court, "impliedly" or "inferentially" determined that petitioner was guilty of contributory negligence or assumption of risk, is utterly unwarranted and completely contradicted by the language of that court's opinion, reading, in part, as follows (Pb4a):

> "Plaintiff's own theory is that the damage to the door rail occurred in the act of unloading and that there was a failure (fol. 188) to inspect after the unloading even though he was injured in doing that very thing at Jersey City. It cannot be said that in such circumstances there was a failure of duty in this regard when it was the very performance of that duty which caused plaintiff's injuries."

Nor does this case, under the evidence, fall within the doctrine *res ipsa loquitur*. Essential prerequisites to the application of that doctrine are absent. First, the happening does not of itself speak of respondent's negligence. It could have resulted, with equal probability, from a number of causes, with which respondent was unconnected. In fact, the proof stands uncontradicted that the cause of the fall of the car door was its movement in petitioner's efforts to close it, upon which was superimposed the distortion of the upper door rail by the pressure, pull and movement of steel cables, used by an agency with which respondent was unconnected, in the unloading of the cargo of copper billets at Perth Amboy while the car was out of respond-

ent's possession. In the second place, the proofs are barren of any basis for inference that respondent had had any opportunity, other than the occasion of petitioner's inspection, or any means, other than the petitioner himself, to make the very inspection which petitioner charges respondent with the duty of making. Finally, although the car was in respondent's yard when petitioner undertook to inspect it, the offending car door and its appurtenances, if in respondent's imputed possession, were in the actual possession and under the exclusive physical control of petitioner. The door did not fall while en route from Perth Amboy to Jersey City, nor until petitioner had forced it almost to a closed position.

San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 98.

See also *Broecker* v. *Armstrong Cork Co.* (E. & A., N.J., 1941), 128 N. J. L. 3, stating the rule (at p. 8) that "where all the facts and circumstances under which the accident occurred are disclosed by the evidence • • • there is nothing left to inference, and the rule of *res ipsa loquitur* does not apply."

The decision of the New Jersey Supreme Court, in reversing petitioner's judgment in the trial court, entered upon a jury verdict there, does not infringe upon petitioner's Constitutional right of trial by jury. In the language of Mr. Justice Frankfurter, in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 64, is found the statement that the Constitutional guarantee of trial by jury presupposes a jury under the proper guidance of a disinterested and competent trial judge (*Herron* v. *Southern Pacific Co.*, 283 U. S. 91), and it is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based. In *Wilkerson* v.

McCarthy, supra, at page 75, Mr. Justice Jackson, dissenting, rejects the doctrine "that any time a trial or appellate court weighs evidence or examines facts it is usurping the jury's function"; adding that " under that rule every claim of injury would require a jury trial, even if the evidence showed no possible basis for a finding of negligence. The determination of whether there could be such a basis is a function of the trial court, even though it involves weighing evidence and examining facts."

In suits under the Statute, a scintilla of evidence is insufficient to make a jury question.

Baltimore & Ohio R. Co. v. *Groeger,* 266 U. S. 521, 524. It is the duty of a trial judge to direct a verdict for defendant, when the testimony, and all inferences deductible therefrom is insufficient to support a verdict for plaintiff.

Toledo, St. Louis & Western R. Co. v. *Allen,* 276 U. S. 165, 168.

In the case at bar, petitioner had his trial by jury. The trial judge, upon the motion to dismiss, held that a jury question was presented by the evidence. The New Jersey Supreme Court held *contra.* Now petitioner seeks another review of the evidence by this Court. Petitioner's right of trial by jury was not affected by the decision below.

II.

No important question of Federal Law is here presented.

The court below (as did also the trial court) recognized that the cause of action rested upon the Federal Employers Liability Act (45 U. S. C. A. §51, *et seq.*), and that it sounded in negligence (Pb2a). The opinion below cited and con-

sidered the controlling effect of decisions of this Court, viz.: *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, and *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329. It undertook to distinguish *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, which was relied upon by petitioner below and here. The sole question presented to and decided by the court below was the same as is or may be presented in every negligence case tried to a jury, i.e., whether the evidence, viewed in a light most favorable to the plaintiff, makes out a *prima facie* case or presents a reasonable basis for inferring defendant's liability. If that question must be answered in the negative, no factual issue persists for the jury's resolution.

> *Brady* v. *Southern Ry. Co.*, 320 U. S. 476;
> *Scocozza* v. *Erie R. Co.* (C. A. N. Y., 1948), 171 Fed. 2d 745; cert. den. 337 U. S. 907.

Unless an important question of Federal law is presented, a petition for a writ of certiorari to review a decision of a State's highest Court upon a purely common law question accomplishes an unwarranted imposition upon the jurisdiction of this Court. The language of Mr. Justice Frankfurter, in his dissenting opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53, succinctly, but comprehensively, sets forth what we believe to be the Court's general attitude toward petitions for certiorari in cases of this kind. At page 66 of the report, we read:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts, even though those facts may have been erroneously

> appraised. • • • For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. It has been our practice to dismiss a writ of certiorari even after it was granted, where argument exposed a want of conflict or revealed that the case involved no more than its particular facts."

See also *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, and *Hill* v. *Atlantic Coast Line R. Co.*, 336 U. S. 911. Also, the expression of the similar views, upon this phase of the matter, of Mr. Justice Roberts in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, at pages 354 and 357.

The judicial language above quoted and referred to is peculiarly opposite to the case at bar, which involves "no more than its particular facts" and the outcome of which is important merely to the parties.

III.

The decision below is not in conflict with any other decision of this or any lower Federal Court.

In determining whether a writ of certiorari should be granted, the existence of a conflict between decisions of a Court of Appeals or of this Court and that of the Court here submitted for review, may be relevant. Petitioner asserts (Pb15) that the facts in *Pitcairn* v. *Perry*, 122 F.

2d 881 (C. A. 8, 1941), cert. den. 314 U. S. 697, were identical with those of the case at bar. The implication follows that the decision of the New Jersey Supreme Court here presented for review is in conflict with that in the *Pitcairn* case. Respondent submits that the two cases are factually distinguishable. In both cases the injured plaintiff was a car inspector injured during the course of his employment by the defendant, under circumstances which appropriately invoked the provisions of the Federal Employers Liability Act. Likewise in both cases, the injuries were inflicted by the fall of the side door of a railroad freight box car during efforts to close the door. With the foregoing, the factual similarity between the cases ceases. The plaintiff in the *Pitcairn* case was engaged in the making of a relatively cursory inspection of the car while it formed one of a train of cars in transit at a stop intermediate between terminal stations. The inspection in the case at bar was being made by the petitioner as the servant and agent of the respondent for the purpose of ascertaining what, if any, defects existed in the car for the purpose of "shopping" the car if the defects were of such a character as to require or render desirable its removal from use and confinement to the railroad shop for the making of repairs. It was the duty of the petitioner to search for and locate any defects in the car and to assign the car to the repair shop if, in petitioner's opinion, its condition so required. In the *Pitcairn* case, the train had stopped at an intermediate point several miles away from where the accident occurred and it was then found that the door of one of the freight cars was open. The train crew then and there attempted to close the door but were unsuccessful, thus bringing home to the railroad notice of a defect in its condition or of the likelihood or possibility thereof. The train thereafter proceeded, and, when it arrived in the

yard where the door fell on the plaintiff, he and three fellow employees renewed efforts to close the door; ultimately requiring the application of a crow bar and the use of a hammer in the process. Finally, while plaintiff stood at the middle of the door and pried upon it with a crow bar and others were tapping on the upper door rail with a hammer, pushing on the rear end of the door and pulling on the door handle, it moved four or five inches forward and then fell upon the plaintiff. The Court of Appeals, in reversing the trial court, held that the doctrine *res ipsa loquitur* applied because it appeared that the offending instrumentality was in the control of the defendant and that the accident was such as would not usually have occurred had the railroad availed itself of the opportunity and facilities for the ascertainment of the defect, the removal of the car from service and the making of appropriate repairs. The Appellate Court expressly pointed out that the evidence failed to show that the plaintiff was under any duty to inspect the top of the door, and, moreover, did show that the door and its appurtenances were not in the exclusive control of the plaintiff at the time the accident occurred.

The case at bar is clearly distinguishable from the *Pitcairn* case (*supra*). Admitting that it was respondent's duty to inspect the car and to remove it from service for repairs if its condition so dictated, it was the petitioner, as the *alter ego* of the respondent, who was the sole means by which the respondent was placed on notice of the car's condition and of discharging the duty of inspection in its behalf. In the *Pitcairn* case, notice of the open door and the difficulty in closing it was obtained by the railroad through the members of its train crew when it stopped at the intermediate point en route to its terminal, at which the door was found open and attempts to close it proved

unsuccessful. Moreover, in the efforts which the plaintiff in the *Pitcairn* case was making to close the door at the point at which the car came to rest, other fellow-employees (also agents and servants of the railroad) were participating, thereby, as the railroad's representatives, sharing control of the offending instrumentality. The present petitioner not only was charged with the duty, as respondent's representative, of inspecting the car for the purpose of ascertaining what, if any, defects it might disclose, was also in exclusive possession and control of the door and its appurtenances. His duty to close the door was only an incident of his duty to inspect the condition of the entire car, including that of the door and its appurtenances. The cause of the fall of the door in the case at bar was not undisclosed. The evidence showed that it fell because the upper rail upon which it moved had been bent up by a steel cable or cables used in unloading operations conducted by an agency other than the respondent and out of respondent's possession and control. The condition of the upper door rail was obvious and apparent to a cursory inspection. Petitioner was performing his work of inspecting the car in broad daylight. This aspect of the facts is not referred to as a basis for support of a plea of contributory negligence or assumption of risk, but it is evidence (and such was uncontradicted) that the sole causal negligence in the case, if any, was that of the petitioner and not that of the respondent.

There were present in the *Pitcairn* case (*supra*) the necessary elements to justify the application of the doctrine *res ipsa loquitur*, viz.: (1) absence of fault of the injured person; (2) exclusiveness of control of the offending instrumentality in the defendant; and (3) an injury such as in the ordinary course of things does not occur if the one having control uses proper care.

San Juan Light & Transit Co. v. *Requena*, 224 U. S. 89, 98-99.

In the case at bar, the offending door and its appurtenances were under the exclusive control of the petitioner, and the evidence fails to support an inference that the injury complained of was without fault of the injured person. The doctrine *res ipsa loquitur* is inapplicable to the case at bar because the damaged condition of the upper door rail, which was responsible for the fall of the car door, was the result of the intervention of an agency other than that of the respondent and over which the respondent had no control. Moreover, the evidence was uncontradicted that when the laden car had been first received by the respondent, and again before it was turned over to the consignee for unloading, the condition of the door and its appurtenances was in all respects safe and proper. The continuance of care by the respondent in the form of a subsequent inspection was being discharged by the petitioner as respondent's agent at the time of the accident. There was no showing that possession and control or opportunity to inspect had resided in or been accorded to the respondent between the time of its last previous inspection and the inspection which was in progress by the petitioner when the injuries were inflicted. The car had last stopped in Perth Amboy where it had been unloaded (R. 158a). It had previously been inspected by Messrs. Hurley and Ivorson at Elizabethport and found in good order (R. 135 and 160a). The car arrived in Jersey City at 11:40 p. m. on July 27, 1948, and was inspected by the petitioner on July 29, at 6:00 p. m. The evidence is silent upon the question when petitioner received his orders to inspect the car and also upon the further question whether any earlier inspection by any other inspector could have been made. There

is nothing in the evidence from which it may be inferred that if the inspection had been made earlier or by another inspector, the door would not have fallen and injured him as it did the petitioner.

An examination of the other cases cited and relied upon by the petitioner will indicate that they are factually distinguishable from the case at bar. In each of them there was evidence which either directly disclosed or served as a reasonable basis for inference of negligence on the part of the employer proximately causal to the injuries or death of the employee. Being factually distinguishable from the case at bar, such cited decisions are not in conflict with the decision below. The authorities relied upon by the petitioner neither warrant nor impel the granting of the writ here sought.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM F. HANLON,
of Counsel.

July 21, 1952.